

ESTTA Tracking number: **ESTTA578153**

Filing date: **12/20/2013**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Notice of Opposition

Notice is hereby given that the following party opposes registration of the indicated application.

Opposer Information

Name	CytoSport, Inc.
Granted to Date of previous extension	12/25/2013
Address	4795 Industrial Way Benicia, CA 94510 UNITED STATES
Attorney information	Jed H. Hansen Thorpe North & Western, LLP 8180 South 700 East Suite 350 Sandy, UT 84070 UNITED STATES docket@tnw.com, hansen@tnw.com, kelley.warner@tnw.com

Applicant Information

Application No	85889463	Publication date	08/27/2013
Opposition Filing Date	12/20/2013	Opposition Period Ends	12/25/2013
Applicant	S&D Coffee, Inc. 300 Concord Parkway South Concord, NC 28027 NEW CALEDONIA		

Goods/Services Affected by Opposition

Class 029. First Use: 0 First Use In Commerce: 0
All goods and services in the class are opposed, namely: Pre-packaged preparations for making beverages, namely, flavored milk drinks

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2714802	Application Date	01/13/1999
Registration Date	05/13/2003	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark			
Description of	NONE		

Mark	
Goods/Services	Class 005. First use: First Use: 1998/06/01 First Use In Commerce: 1998/06/01 Powdered nutritional supplement containing milk derived ingredients for adding to food or drink

U.S. Registration No.	2973352	Application Date	05/27/2003
Registration Date	07/19/2005	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2001/10/01 First Use In Commerce: 2001/10/01 Meal replacement drinks; meal replacement and dietary supplement drink mixes; protein based, nutrient-dense meal replacement bars; and pre-mixed nutritionally fortified beverages Class 029. First use: First Use: 2001/10/01 First Use In Commerce: 2001/10/01 Protein based, nutrient-dense snack bars		


U.S. Registration No.	2809666	Application Date	05/22/2000
Registration Date	02/03/2004	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK		
Design Mark	<p style="text-align: center;">MUSCLE MILK</p>		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 1999/10/08 First Use In Commerce: 1999/10/08 nutritional supplements		

U.S. Registration No.	3311489	Application Date	02/09/2007
Registration Date	10/16/2007	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK N' OATS		

Design Mark	MUSCLE MILK N' OATS
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 2006/01/00 First Use In Commerce: 2006/01/00 Dietary and nutritional supplement Class 030. First use: First Use: 2006/01/00 First Use In Commerce: 2006/01/00 Fortified food, namely, protein based, nutrient-dense oatmeal

U.S. Registration No.	3333886	Application Date	02/09/2007
Registration Date	11/13/2007	Foreign Priority Date	NONE
Word Mark	MUSCLE MILK LIGHT		
Design Mark	MUSCLE MILK LIGHT		
Description of Mark	NONE		
Goods/Services	Class 005. First use: First Use: 2007/01/00 First Use In Commerce: 2007/01/00 Dietary and nutritional supplements		

U.S. Registration No.	3971667	Application Date	06/05/2005
Registration Date	05/31/2011	Foreign Priority Date	NONE
Word Mark	MONSTER MILK		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 005. First use: First Use: 2008/07/00 First Use In Commerce: 2008/07/00 Dietary and nutritional supplements, excluding ready to drink beverages

Attachments	76053632#TMSN.gif(bytes) 77103685#TMSN.jpeg(bytes) 77103674#TMSN.jpeg(bytes) 78643905#TMSN.jpeg(bytes) opposition.PDF(93727 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by USPS Express Mail Post Office to Addressee on this date.

Signature	/Jed H. Hansen/
Name	Jed H. Hansen
Date	12/20/2013

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Attorneys for Opposer, CytoSport, Inc.
Opposed Mark: MILK SPLASH
U.S. Trademark Application Serial Number 85/889,463

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

CytoSport, Inc. Opposer, v. S&D Coffee Applicant.	Opposition No. _____
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NOTICE OF OPPOSITION

CytoSport, Inc. (hereinafter referred to as “Opposer” or “CytoSport”), a corporation existing under the laws of the State of California, having a principal place of business at 4795 Industrial Way, Benicia, California 94510, believes it will be damaged by the registration of the mark MILK SPLASH in Application Serial No. 85/889,463, and opposes and alleges the following:

1. Upon information and belief, S&D Coffee (hereinafter referred to as “Applicant” or “S&D”), is a corporation doing business in the state of North Carolina, having a principal place

of business at 300 Concord Parkway South, Concord, North Carolina 28027, seeks to register the mark MILK SPLASH as a trademark for “pre-packaged preparations for making beverages, namely, flavored milk drinks” in International Class 029.

2. CytoSport is in the business of manufacturing and marketing nutritional and dietary supplement products. Among the products offered by CytoSport is a family of nutritional supplement powdered drink mixes and ready-to drink nutritional drinks.

3. CytoSport’s powdered and ready-to-drink nutritional supplement products are sold under a variety of trademarks, including, but without limitation, MUSCLE MILK®, MUSCLE MILK LIGHT®, and MONSTER MILK®

4. CytoSport also sells other nutritional supplement products using its trademarks, including the marks MUSCLE MILK®, MONSTER MILK®, and MUSCLE MILK N’ OATS®. CytoSport has built a family of brands and trademarks that have the common term “milk,” which has become a distinctive and recognizable component of the CytoSport family of marks.

5. CytoSport has been using numerous of the above-referenced marks in commerce for many years. For example, CytoSport’s MUSCLE MILK® mark has been used in commerce since at least as early as June of 1998.

6. CytoSport is the owner of several United States federal trademark registrations associated with its family of trademarks including: U.S. Trademark Reg. No. 2,714,802 for the mark MUSCLE MILK® for use in connection with “powdered nutritional supplement containing milk derived ingredients for adding to food and drink,” U.S. Trademark Reg. No. 2,973,352 for the mark MUSCLE MILK® for use in connection with “meal replacement drinks; meal replacement and dietary supplement drink mixes, protein based, nutrient-dense meal replacement drinks; meal replacement bars; and pre-mixed nutritionally fortified beverages,”

U.S. Trademark Reg. No. 2,809,666 for the mark MUSCLE MILK® for use in connection with “nutritional supplements,” U.S. Trademark Reg. No. 3,311,489 for the mark MUSCLE MILK N’ OATS® for use in connection with “dietary and nutritional supplements” and “fortified foods, namely protein based, nutrient-dense oatmeal,” U.S. Trademark Reg. No. 3,333,886 for the mark MUSCLE MILK LIGHT® for use in connection with “dietary and nutritional supplements,” and U.S. Trademark Reg. No. 3,971,667 for the mark MONSTER MILK® for use in connection with “dietary and nutritional supplements, excluding ready to drink beverages.”

7. CytoSport is also the owner of numerous pending applications for federal trademark registration, many of which have been used in commerce for many years. Those pending applications include the marks CYTOSPORT MONSTER MILK™, and MUSCLE MILK PROTEIN™. All of the above-referenced marks are collectively referred to herein as CytoSport’s Milk Family of Trademarks. Products associated with this family of trademarks are collectively referred to herein as CytoSport’s Milk Family of Products.

8. CytoSport’s Milk Family of Products has been very successful and sales have grown significantly since introduction.

9. CytoSport has sold hundreds of millions of dollars of its Milk Family of Products across the United States and invested tens of millions of dollars in the promotion and advertisement of the Milk Family of Products using the Milk Family of Trademarks.

10. Due to its large distribution and customer awareness of its Milk Family of Products, CytoSport has significant common law rights associated with its Milk Family of Trademarks throughout the United States. CytoSport’s Milk Family of Trademarks have acquired great value as identifiers of CytoSport’s products and serve to distinguish CytoSport’s Milk Family of Products from those of others in the marketplace. Customers readily recognize

members of CytoSport's Milk Family of Products. CytoSport's Milk Family of Trademarks is an asset of enormous value as symbols of CytoSport and its quality products and goodwill.

11. MUSCLE MILK® is a famous trademark.

12. Registration of Applicant's MILK SPLASH mark is likely to dilute CytoSport's Milk Family of Trademarks or individual members thereof.

13. Registration of Applicant's MILK SPLASH is likely to damage CytoSport in that Applicant's mark, when used on or in connection with the identified goods, so resembles Opposer's Milk Family of Trademarks, or individual members thereof, as to be likely to cause confusion, to cause mistake or to deceive. Such confusion is likely to falsely suggest a connection between Applicant and CytoSport.

14. Upon information and belief, Applicant selected its mark with full knowledge of Opposer's marks.

WHEREFORE, Opposer requests that Application Serial No. 85/889,463 be refused registration, that no registration be issued to Applicant for the mark MILK SPLASH and that this Opposition be sustained in favor of Opposer.

That statutory Opposition Filing Fee of \$300.00 per class opposed is included herewith. Please charge any additional fees and credit any overpayment to Deposit Account No. 20-0100.

DATED this 20th day of December, 2013.

Respectfully submitted,

/Jed H. Hansen/
Peter M. de Jonge
Jed H. Hansen
Attorneys for Opposer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **NOTICE OF OPPOSITION** was served upon the Applicant at the following by the methods indicated below:

Jack B. Hicks
Womble Carlyle Sandridge & Rice, LLP
PO Box 7037
Atlanta, GA 30357-0037

- ☐ Electronic Mail
- ☒ United States Mail
First Class, Postage Pre-Paid
- ☐ Overnight Delivery
- ☐ Fax Transmission

DATED this 20th day of December, 2013.

/Kelley Warner/
Kelley Warner